U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF G-K-C-A-N-

DATE: FEB. 4, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a church, seeks to permanently employ the beneficiary in the United States as an art director under the immigrant classification of advanced degree professional. *See* Immigration and Nationality Act (the Act) § 203(b)(2), 8 U.S.C. § 1153(b)(2). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The appeal will be dismissed.

The Petitioner filed the instant Form I-140, Immigrant Petition for Alien Worker, on June 13, 2014. As required by statute, the petition was accompanied by an ETA Form 9089, Application for Permanent Employment Certification, which was filed with the Department of Labor (DOL) on October 24, 2013, and certified by the DOL (labor certification) on May 5, 2014. To be eligible for approval, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date (October 24, 2013, in this case).[1] *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) and *Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977).

For the job at issue in this proceeding – art director – the Petitioner specified in Part H of the ETA Form 9089 the following education, training, and experience requirements:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	Design or related
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	No
7.	Is there an alternate field of study that is acceptable?	No
8.	Is there an alternate combination of education and experience that is acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes

[1] The priority date of an immigrant petition is the date the underlying labor certification application was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

Thus, the labor certification specifies that a master's degree in design or a related field, or a foreign educational equivalent, is required for the job. No training or experience is required, and no alternate combination of education and experience is acceptable.

As evidence of the Beneficiary's educational credentials the Petitioner submitted the following pertinent documentation with the Form I-140 petition and its response to the Director's request for evidence:

- A copy of a "Certificate" from [redacted] in [redacted] South Korea, dated April 25, 2013, stating that the Beneficiary was admitted to the institution on March 2, 1985, and graduated with a Bachelor of Fine Arts in the field of industrial design on February 21, 1987;
- A copy of a "Certificate of Completion" from [redacted] in [redacted] South Korea, dated April 24, 2013, stating that the Beneficiary was admitted to the institution on September 1, 1989, in the Master's Program of the Graduate School of Industrial Arts, and that her "date of completion" was February 29, 1992;
- A copy of a "Scholastic Transcript" from [redacted] in [redacted] South Korea, dated April 24, 2013, which listed the Beneficiary's four semesters of coursework in the Master's Program in Industrial Arts, but left the entries for "Date of Graduation" and "Degree Received" blank; and
- An Evaluation of Academic Credentials from [redacted] in [redacted] dated January 23, 2015, asserting that the Beneficiary's coursework at the above two universities was equivalent to a Master of Arts degree in Design from an accredited institution of higher education in the United States.

On April 24, 2015, the Director denied the petition. Based on the evidence of record the Director found that the Beneficiary does not have a master's degree from [redacted] because neither the "Certificate of Completion" nor the "Scholastic Transcript" indicates that the Beneficiary received a degree from that institution. The Director concluded, therefore, that the Beneficiary does not qualify for the job offered under the terms of the labor certification and is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act.

The petitioner filed an appeal, which was supplemented by a brief from counsel and copies of documentation already in the record. We conduct appellate review on a *de novo* basis. *See Soltane v. Department of Justice*, 381 F.3d 143, 145 (3d Cir. 2004).

I. ELIGIBILITY FOR CLASSIFICATION AS AN ADVANCED DEGREE PROFESSIONAL

At this point, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
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> (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
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> (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS.[2] The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] Id. at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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> . . . .
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> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, 696 F.2d at 1008, the Ninth Circuit stated:

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[2] INS – the legacy Immigration and Naturalization Service – was replaced in part by USCIS as a result of the Homeland Security Act of 2002, effective March 1, 2003.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference [visa category] status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating:

> [T]he Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). *See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
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> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Tongatapu Woodcraft Hawaii, Ltd. v. Feldman, 736 F. 2d 1305, 1309 (9th Cir. 1984).

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification.

In the instant case, the Petitioner requests classification of the Beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).

Section 203(b)(2) of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States.[4] The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The regulation at 8 C.F.R. § 204.5(k)(3)(i) specifies the evidentiary requirements to establish eligibility for classification as an advanced degree professional. It reads as follows:

> To show that the alien is a professional holding an advanced degree, the petition must be accompanied by:
> (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The Beneficiary's official academic record shows that she received a bachelor's degree in fine arts from [redacted]. The Beneficiary's official academic record also shows that she studied for four semesters in a master's degree program at [redacted] in [redacted] but it does not show that she received a master's degree after completing her studies. The Beneficiary's "Certificate of Completion" from [redacted] states that her date of admission was September 1, 1989, and her date of completion was February 29, 1992, and that her "degree sought" was a "Master's Program" in industrial arts. Unlike the Beneficiary's "Certificate" from [redacted] which states that the "degree conferred" to her in 1987 was a "Bachelor of Fine Arts," the Beneficiary's "Certificate of Completion" from [redacted] contains no information that a master's degree was actually

[4] Section 203(b)(2) of the Act also provides immigrant classification to aliens of exceptional ability. There is no evidence in the record of proceeding that the beneficiary possesses exceptional ability in the sciences, arts or business. Accordingly, consideration of the petition will be limited to whether the beneficiary is eligible for classification as a member of the professions holding an advanced degree.

conferred upon the Beneficiary. The "Scholastic Transcript" from as previously noted, leaves the entries for "date of graduation" and "degree received" blank.

On appeal the petitioner cites the previously submitted academic credentials evaluation from as evidence that the Beneficiary's educational credentials from South Korea are "the equivalent of **a Master of Arts degree in Design** from an accredited institution of higher education in the United States" (evaluation, page 2, emphasis in the original). According to the Beneficiary "qualified for the Master's Degree in 1992" after completing the requisite academic coursework and examinations. *Id.* at 1. The evaluation also states that "[t]he Certificate of Completion is evidence that [the Beneficiary] completed the course of studies in the Master's program." *Id.* Based on her entire academic record at , the evaluation concludes that the Beneficiary "satisfied requirements equivalent to those required for the attainment of a University degree from an accredited institution of higher education in the United States." *Id.* It is noteworthy, however, that the evaluation does not claim that the Beneficiary actually received a master's degree from [5]

Counsel for the petitioner appears to acknowledge in the appeal brief that the Beneficiary did not receive a master's degree after her studies at "Had their [*sic*] been a diploma issued," counsel asserted, "the need for a foreign degree equivalency would have been wholly unnecessary under 9 CFR 204.5(k)(3)(i)." Appeal Brief, paragraph 14. No explanation has been provided by the Petitioner or the Beneficiary as to why the Beneficiary was not awarded a master's degree after completing four semesters of coursework in a master's program in industrial design at .

The regulations clearly state that the Beneficiary must have either (A) "a United States advanced *degree* or a foreign equivalent *degree*," or (B) "a United States baccalaureate *degree* or a foreign equivalent *degree*" plus "at least five years of progressive post-baccalaureate experience in the specialty" to be eligible for classification as an advanced degree professional. 8 C.F.R. § 204.5(k)(3)(i)(A) and (B) (emphasis added). No U.S. or foreign equivalent education is acceptable, under either alternative, unless it includes a degree. The documentation of record indicates that the Beneficiary does not have a master's degree from Therefore, the Beneficiary is not eligible for classification as an advanced degree professional under 8 C.F.R. § 204.5(k)(3)(i)(A). While the documentation of record does indicate that the Beneficiary has a baccalaureate degree (in industrial design) from there is no evidence in the record that the Beneficiary has five or more years of post-baccalaureate experience in the specialty. Therefore, even if the labor certification allowed for such a combination of education and experience, the record does not demonstrate that the Beneficiary

[5] As noted by the Director in the denial decision, evaluations of a person's foreign education by credentials evaluation organizations are utilized by USCIS as advisory opinions only. Where an opinion is not in accord with other information or is in any way questionable, USCIS is not required to accept it or may give it less weight. *See Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm. 1988).

would be eligible for classification as an advanced degree professional under 8 C.F.R. § 204.5(k)(3)(i)(B).

Based on the evidence of record, therefore, we agree with the Director that the Beneficiary is not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. Accordingly, the petition cannot be approved.

II. QUALIFICATIONS UNDER THE TERMS OF THE LABOR CERTIFICATION

To be eligible for approval as an advanced degree professional a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg'l Comm'r 1977). The key to determining the job qualifications is found in Part H of the ETA Form 9089. This section of the labor certification application describes the minimum education, training, and experience required for the job offered.

In this case, the labor certification states that the offered position of art requires a master's degree in design or a related field, or a foreign educational equivalent (Part H, lines 4, 4-B, 7, and 9). The labor certification states that an alternate combination of education and experience is not acceptable (Part H, line 8).

The Beneficiary does not have a U.S. master's degree or an equivalent foreign degree in design or a related field. While the evidence of record indicates that the Beneficiary does have a bachelor's degree in industrial design from a South Korean university, the labor certification does not allow for this degree to be combined with five years of post-baccalaureate experience in the specialty to meet the alternate definition of an advanced degree. In any event, there is no evidence of the Beneficiary's employment experience in the record. Thus, the Beneficiary does not satisfy the minimum educational requirement of the labor certification to qualify for the job offered. For this reason as well, the petition cannot be approved.

III. CONCLUSION

We affirm the director's determination that the beneficiary does not possess a U.S. master's degree or a foreign equivalent degree, as required to be eligible for classification as an advanced degree professional under section 203(b)(2) of the Act and to qualify for the job offered under the terms of the labor certification. Accordingly, the appeal will be dismissed.

The burden of proof in these proceedings rests solely with the petitioner. *See* section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of G-K-C-A-N-*, ID# 15608 (AAO Feb. 4, 2016)